

Both the District Attorney and the Attorney General are practically bound to carry an appeal up, asking that the decision be reversed, so that the point may be settled by the highest court, and among lawyers who saw the decision last night, though the opinion was universal that Justice Gerard had made an exhaustive report, many believed that, owing to the peculiar nature of the case, Brandt having now served five years of his term, the higher courts might overturn the decision.

Apart from the involved legal tangle by which Brandt may gain freedom, the way of executive clemency is still open, and will be until Friday morning at 9 o'clock, when the decision will be filed. Until then Brandt is technically a convict, with five years of his thirty-year term behind him, and as such is a fit subject for a pardon from the Governor. After that, with the habeas corpus sustained and Brandt remanded for trial on the indictments pending against him, the Governor's pardon power does not operate. Brandt would then be in the position of a prisoner awaiting trial, and the Governor can pardon only a convicted man.

"The constitution provides that the Governor may pardon, after conviction," it was explained by District Attorney Whitman, last night, with reference to this point, and bearing also upon the possible continuation of the Governor's inquiry, through Commissioner Hand, "there is nothing to prevent the Governor from going ahead and taking all the testimony he wants, but with Justice Gerard's decision filed and upheld by the higher courts, no one could pardon Brandt."

#### Assault Charge Proof Lacking.

If the Gerard decision is sustained after appeal, that will also have the effect of practically freeing Brandt, for the reason that the Gerard decision itself thoroughly knocks out the indictment for first degree burglary, and as to the other indictment, the one for felonious assault, Brandt has already served five years illegally, which would be as much as he would get under a plea of guilty on the second indictment, and it is believed that proof to convict on the felonious assault indictment could not be produced.

In any event, unless the Governor sees what will probably be his last opportunity to pardon Brandt, the former Schiff servant will walk out of the Tombs prison to-morrow, but in that case it will be as a prisoner released on bail.

In view of the fact that both indictments against him are admittedly weak, it is believed that the bail, if any is required, will be very light—much less than the \$50,000 under which he was held five years ago—and that, indeed, it is more than probable that he would be paroled in the custody of counsel.

Actually only one serious difficulty confronts Brandt now, and that is based on the possibility that Justice Gerard's decision would be upset by the higher courts, and that Governor Dix might again refuse to pardon him, in spite of the recommendations of Attorney General Carmody, District Attorney Whitman and Special Commissioner Hand.

## BRANDT REMANDED FOR TRIAL

Judge Rosalsky Severely Criticised for First Degree Burglary Sentence.

"The writ is sustained and the prisoner remanded to the Tombs subject to an application for bail to await trial under the indictment for burglary in the first degree," this was the decision given by Justice Gerard yesterday afternoon on the application for a writ of habeas corpus for Folke E. Brandt. The decision was handed down shortly after the word came from Albany that Governor Dix had declined to act in the case until he had conferred with Hand. Preceding the final words sustaining the writ, it said:

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In the opinion on which the decision is based Judge Rosalsky is severely taken to task. "If Brandt was sentenced because he was involved in a net of verbiage," says Justice Gerard, "and pleaded guilty to a crime which his examination at the time of his plea showed he did not admit committing and did not intend to plead guilty to, he should not be left to seek his remedy by executive clemency alone. He is entitled to a decision of the court, relieving him from the stigma of his mistaken plea."

And in discussing the proceedings before Judge Rosalsky the criticism is still more severe. "There is and should be a distinction between the commission of a mere error made, possibly on a ruling as to the admission or the rejection of evidence by a trial judge, and the occurrence of what amounts to a legal deception as far as the prisoner is concerned, and which is, therefore, in derogation of his rights," says Justice Gerard. "An error such as an error in the nature of a ruling on the admission or rejection of evidence may be reversed on appeal, but an error of the nature of the one made here, after its occurrence, gives the judge no jurisdiction to sentence the prisoner."

He continues: "There are active errors and errors of silence. Here the trial judge, who was the prisoner's representative by counsel, the prisoner asked for the aid of his counsel and proceeded in the plea made when the judge learned from the sworn statement of the prisoner, facts which show that the prisoner did not commit the crime to which he pleaded guilty and that he did not intend to plead guilty to such a crime."

The judge who sits to represent the prisoner and to see that justice is duly administered cannot be a party even silently to a proceeding as against the prisoner. If a deception were practised by a prosecutor the judgment would probably be voidable and not void. But where the error of this nature is that of the judge he has no jurisdiction after its happening to sentence the prisoner. Lord Coke has said that such a state of facts avoids all judgments. Can any court hold that where a prisoner is sentenced by a judge who has said that he does not admit the crime or intend to plead guilty to it, that the judge is mistaken in his plea and that he will be confirmed in his mistake and lulled into inaction until

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If that situation arises Brandt will have no recourse but to return to Dannemora prison, and as his appeal to Governor Dix would have failed he would have no choice but to wait until he can renew his appeal when Governor Dix's successor is in office.

#### Can Go Before Grand Jury.

When the Grand Jury meets again to-morrow morning, however, Brandt, if not then freed by the Governor's pardon, will at least be in the position of an unconvicted man awaiting trial. As such he would not be a convict, and his testimony before the grand jury would be acceptable. It is known that the grand jury is anxious to hear Brandt, and that they believe that by hearing him they can get closer to the heart of the conspiracy, if one exists, than by any other means, and it is probable that he will go before them to-morrow morning.

No witnesses were heard by the grand jury yesterday, but it is understood that J. C. Rothschild and J. E. Carey, of the Critter Club, talked with the District Attorney and told him what they could about the alleged conference of the Schiff forces there at the time when Brandt was awaiting sentence five years ago.

Mr. Nicol issued a brief statement, after the Gerard decision had been announced, as follows:

"The decision is an important one and may have far-reaching consequences. We assume that an appeal will be taken to the law finally settled. So far as we are concerned our sole interest is that in a public proceeding the whole truth may come to light and that the investigation before the Commissioner be made as broad as possible."

The Nicol-Parker letter to the Governor was practically a repetition of Mr. Nicol's arguments before Commissioner Hand on Tuesday. Their appeal for a further hearing before Hand is believed by the lawyers interested in Brandt's behalf to be a useless proceeding, for the reason that as soon as Justice Gerard's decision is filed the Governor will be without power in the premises, and any continuation of the Hand inquiry would be purely academic.

#### Decision Pleases Towns.

Mirabeau L. Towns, chief counsel to Brandt, expressed gratification after the Gerard decision had been announced that the "great right of habeas corpus had again demonstrated its efficiency to right wrongs where executives refused to act." Brandt, said Mr. Towns, happened to be the instrument through which this principle was brought forward, and Brandt would now have the assurance of a fair trial.

"I think it will be some time in this city before an ignorant boy's plea of guilty, with a statement showing want of guilt, will call forth from the judge before whom he pleads a sentence to state prison until the judge is convinced beyond a doubt that the prisoner is guilty of the crime to which he pleads guilty."

District Attorney Whitman will have a conference with Attorney General Carmody early next week over the question of filing an appeal from Justice Gerard's decision, provided always that the Governor refuses to act even after receiving Mr. Hand's recommendations to-day.

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## JUDGE AND ATTORNEY GENERAL WHO ACTED IN BRANDT CASE YESTERDAY.



JUSTICE JAMES W. GERARD. Who sustained writ of habeas corpus giving Brandt a new trial.

ATTORNEY GENERAL CARMODY. Who urged Governor Dix to pardon Brandt at once.

prisoner as well as the state, is not justified in accepting the plea of guilty to this particular crime, constituted such an error leading to the deception of the prisoner in the technical and legal sense as deprived him of jurisdiction to sentence the prisoner.

It is true that there may be another remedy, in the nature of an appeal or motion in arrest of judgment, but the mere fact that the prisoner is mistaken in making a plea of guilty renders it unlikely that he will be undeceived in time to prosecute an appeal within the time limited by law. The acceptance by the judge of the plea under these circumstances is an error as against the prisoner. An error based on the error of the prisoner in believing that he was committing a crime to which he pleads guilty. To hold otherwise would be to give approval to a procedure which would permit the judge to receive a plea to a certain crime from a prisoner who is not represented by counsel, and then impose a sentence for that crime, although the facts before him show both that the prisoner did not intend to plead guilty to that crime and that the crime was not committed. Is there any remedy if such a result is reached in courts?

Judge Rosalsky, having been thus severely criticised, is then excused for his mistake on the ground of youth and inexperience, Justice Gerard saying:

"When I state that the judge committed an error, I do not state that in the sense that he intended despoiled to harm or deceive the prisoner. The long sentence given by this judge may have been induced by some record presented to him, but I only find that as a matter of law that the failure of the judge to take some action to inform the prisoner of the nature of his plea and his receiving and acting on the formal plea of guilty, when he should have

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"I have yet to hear any explanation that effectually disposes of the suggestion that powerful influences were at work to bring about the incarceration of Brandt," he says.

He discusses at length the employment of "three leading firms of lawyers in the city of New York" to represent Schiff before the Governor. "For what purpose?" he asks. "In another part of the communication to the Governor he answers himself, 'So far as I have been able to learn, he says, 'no attempt has been made to offer any proof supporting the conviction for burglary or to urge the denial of executive clemency upon any other ground than that the prisoner, at some time, or in some way, has assailed the fair name of Mr. Schiff's family.'"

Such an attack would not be permitted, the Attorney General said, in proceedings in which he and District Attorney Whitman had a part, even by Schiff's own lawyers. It certainly was no part of the record or material evidence before the Governor. And, the Attorney General reasoned, if anything of that kind entered into the conviction of Brandt, "it was wrong, fully convicted and wrongfully imprisoned."

"Transgression of the Law." "He may be the most atrocious criminal, the most degenerate libertine," says Mr. Carmody, "but he cannot be deprived of his liberty except upon an indictment charging him with this offence. To charge him with burglary and keep him in prison because he is a libertine is a transgression of both the form and the spirit of the law."

Mr. Carmody gave out this letter to the Governor after several talks with the Executive, who had told him he would take no action in the case until he had conferred with Commissioner Hand. The latter will come here to-morrow and will go over with the Governor the question of admitting the testimony of Mr. and Mrs. Schiff and Howard Gans, the immunity proposition and various other phases of the case. Pending that, the Governor would say nothing about the case and did not seem anxious to discuss it even with the Attorney General. All he said was this:

"I will go over the case with Judge Hand. I want his investigation to be as wide and sweeping as possible, so that the exact truth and justice shall be brought out." The Governor has before him an application from DeLancey Nicol, of the Schiff counsel, for permission to make an argument to him on the immunity question. The Governor will take that up with Judge Hand, and will make no answer to Mr. Nicol before that time.

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Mr. Carmody would not discuss the release of Brandt by Justice Gerard until he sees the text of the decision. He opposed such action, and filed a brief with the Justice opposing it. Nevertheless, it is assumed by those who know his views as to the justice of freeing Brandt that unless the Governor pardons the convict soon the Attorney General will take no further step in contesting Brandt's release on the writ of habeas corpus.

In his opinion to the Governor, Attorney General Carmody outlines the proceedings in the case to date and explains why he united with District Attorney Whitman in opposing the swearing of Mr. and Mrs. Mortimer L. Schiff, Howard S. Gans and perhaps other witnesses before Commissioner Hand, "for the purpose, as stated, of opening up the whole matter and showing that Brandt had attempted to assault and disgrace the fair name of Mrs. Schiff."

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found from the prisoner's testimony that the prisoner never intended to plead guilty to this particular crime, constituted such an error leading to the deception of the prisoner in the technical and legal sense as deprived him of jurisdiction to sentence the prisoner.

#### Young Judge Liable to Error.

His error of judgment was, as far as is disclosed by the record, only such an error of judgment as I myself may make in this decision. It is an error into which a judge new to the bench might well fall and it is one which the trial judge undoubtedly made. The error after the point had been raised on the argument on the writ of habeas corpus before me, although I am satisfied that this correct which perhaps otherwise would deprive me of jurisdiction to determine this matter, is as void as the original sentence.

Carl Fischer-Hansen is left without amercement for his part in the conviction and sentencing of Brandt by the opinion of Justice Gerard. The opinion says of Hansen: "After the plea of the prisoner and the occurrence of the colloquy between him and the judge on March 28, 1907, the prisoner was arraigned for sentence on April 6, 1907. On that date he was represented by counsel, but the counsel was certainly justified in believing that there was nothing for him to do but to ask the court to exercise leniency because the formal record purported to show that on the 28th day of March, 1907, the prisoner had formally pleaded guilty to burglary in the first degree, and had pleaded guilty to burglary in the first degree."

Justice Gerard notes that Brandt was indicted on a charge of assault and may still be tried on that indictment.

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Mr. Carmody says he opposed this upon the ground that it had no bearing upon the

opinion that such evidence is immaterial. The question before Commissioner Hand and the Governor, he says, is twofold, as follows:

"First: Was Brandt properly convicted and sentenced?"

"Second: In view of all the circumstances, was the sentence excessive; or, taking into account the circumstances of the conviction, the youth of the prisoner and his good prison record, is executive clemency warranted?"

"Upon neither of these points is the evidence sought to be introduced important or instructive."

The minutes of the grand jury, Mr. Carmody says, do not show that the crime of burglary was committed, and that it is only by stretching every rule in favor of supporting the indictment that it can be held sufficient. In other respects, he points out, it is absolutely defective. Although pleading guilty to the indictment charging burglary, Brandt denied the fact before the court.

#### Inconsistent with Honesty.

Brandt must have told his counsel that he was not guilty of burglary, as he told the court," says the Attorney General, "and it seems to me absolutely inconsistent with honest proceedings that he could have been convicted and sentenced for a crime that the minutes of the grand jury do not show that he committed, and that he himself denied when asked about it."

"I do not find it necessary to dwell upon accusations of conspiracy in pointing out these remarkable features. If such a conspiracy existed, then the matter is explained. I have yet to hear any explanation that effectually disposes of the suggestion that powerful influences were at work to bring about the incarceration of Brandt."

Mr. Carmody then goes into Mr. Schiff's statement of how he found Brandt in his house, in his dressing gown, and in his stocking feet. Brandt claimed to have been there two hours.

"If he went there," says the Attorney General, "to commit burglary he had ample opportunity to do so, and had he failed to do so he would not have remained until he was caught, but he did remain apparently for the purpose of meeting Mr. Schiff. Whether to rob him, as Schiff claims, or to solicit aid, as Brandt claims, it was not burglary."

#### Not Punished for Assault.

"He may have committed, and undoubtedly did commit, a heinous crime, for which he should have been punished, and for which he already stands indicted under another charge, namely, assault, but that is not what he was punished for. He is here charged with burglary. He can only be convicted of and punished for burglary. Under a charge of burglary he cannot be deprived of his liberty, except upon an indictment charging him with this offence, and being given an opportunity to meet the accusation. To charge him with burglary and keep him in prison because he is a libertine is a transgression of both the form and the spirit of the law."

"The action of Schiff, in escorting him to the front door, letting him out and giving him \$50, and asking him to return three days later, at which time he would consider his case, absolutely repelled the idea that Schiff himself thought that Brandt had been guilty of burglary."

Mr. Carmody calls the Governor's attention to Brandt's prison record, which shows that during his five years' incarceration only one mark was made against him, and that for talking in the prison yards. Another fact of great significance, the Attorney General says, was the action of Judge Rosalsky, in whose court Brandt was sentenced, in setting aside the judgment of conviction.

#### Efforts to Block Pardon.

Mr. Carmody states that there is on file in the prison records a letter from Mr. Gans saying that he wished to be informed of any application for executive clemency in this case. Brandt says he expected his liberty at the end of a year. After serving a year he was transferred to Clinton prison and an effort was started by Schiff's counsel to prevent the extension of clemency.

"That effort has been renewed in this proceeding," adds Mr. Carmody, "and to my mind forms the most remarkable epoch in the history of the proceeding."

"The issue should not be clouded. Brandt is not the important factor here. A more important factor is, will the forms ordained by the Constitution for ascertaining guilt be observed? Must the methods laid down by our statutes for investigation and punishing it be overridden in the blind fury of vengeance? I say no; and I ask your excellency to do a simple act of justice and extend executive clemency to Folke E. Brandt. Let him be remanded to the custody of the District Attorney of New York County, to be tried for any crime that he committed, but let him no longer be punished for a crime which he did not commit."

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Says He Had Him Arrested When His Valet for Robbing Him.

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"I employed Brandt in 1905," he said, "as my valet. I was then living at No. 402 South Broad street. He was a tall, good looking young man, who dressed well and had refined manners and bearing. I secured him through an intelligence office that made a specialty of Swedish help."

"Brandt did not like the negro help, and he began to make preparations to leave my place. At the same time I found that he had stolen my clothing and had gone to patients whose names he secured from my account books and collected money from them that he failed to turn over to me—in fact, that he had stolen wherever he had a chance."

"I had him arrested and I recovered most of the stolen goods, and withdrew the prosecution when I received a letter from him begging forgiveness and promising to leave the city if I let him go."

## SIXTH GIRL ATTACKED

Bay Ridge School Teacher Has Broken Skull—Man Escapes.

May Chase, twenty years old, a school teacher, living with her mother and two sisters at No. 418 80th street, Bay Ridge, was on her way to a butcher shop last evening, when a man struck her on the head with some blunt instrument. Before she could make an outcry he struck her again, knocking her unconscious.

William Dunne, of No. 426 80th street, saw the man dragging the unconscious girl into a vacant lot nearby. Remembering the many assaults that have occurred in that section in the last few months, Dunne let out a yell and then started after the man, who ran. Dunne's cries attracted several others, among them Mrs. Annie Chase, mother of the victim.

Led by Dunne—the party took up the chase toward Fort Hamilton. More than a half dozen blocks were covered on the fugitive slipped into a house on the Shore road and made good his escape. Inquiries were made about the place

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